Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. IRA JEROME MOORE, Defendant.	No. CR98-16-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

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I. INTRODUCTION AND FACTUAL BACKGROUND

On February 26, 1998, a three-count superceding indictment was returned against defendant Moore, charging him with conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371, attempted bank robbery, in violation of 18 U.S.C. § 2113(a), and interstate transportation of a stolen vehicle, in violation of 18 U.S.C. § 2312. On May 7, 1998, defendant Moore was convicted on all counts following a jury trial. He was subsequently sentenced to 210 months imprisonment. Defendant Moore appealed both his sentence and his criminal conviction. On direct appeal, Moore argued that: (1) the court erred in concluding that Moore had waived his right to counsel in a prior state court felony case and in using that burglary conviction to sentence him as a career offender; (2) the court erred in allowing a jailhouse informant to testify about Moore's conversations at the jail; (3) the court erred in permitting evidence regarding Moore's 1995 bank robbery in Georgia; (4) the court erred in allowing evidence regarding an attempted bank robbery in Arkansas four days before the criminal actions in this matter occurred; and (5) the court erred in ordering Moore to pay restitution for the lost income of a witness. The Eighth Circuit Court of Appeals affirmed defendant Moore's conviction and sentence. *See Moore v. United States*, 178 F.3d 994, 996 (8th Cir.), *cert. denied*, 528 U.S. 943 (1999). Defendant Moore subsequently filed his current motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Moore challenges the validity of his conviction on the following grounds: (1) that he was denied effective assistance of counsel at trial, at sentencing and on his appeal; (2) that his sentence under the Career Criminal Act is unconstitutional in light of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (3) that his prior burglary of a commercial building should not have qualified as a "crime of violence" under the Career Criminal Act because it did not qualify under section 4B1.1 of the United States Sentencing Guidelines; (4) that his sentence enhancement for valuation was unconstitutional under *Apprendi*; and,

(5) that his sentencing enhancement under U.S.S.G. § 2B3.1(2)(E) was unconstitutional under *Apprendi*.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*,

507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

1. Ineffective assistance of counsel claims

Defendant Moore asserts that his counsel lacked preparation and failed to investigate the laws concerning his indictment. As a result, defendant Moore contends that his counsel failed to see "fatal flaws" in the indictment.

Moore's claims of ineffective assistance of counsel that he has presented in his § 2255 motion were not raised on direct appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims "are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458,

1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in *Strickland* requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Strickland*, 466 U.S. at 689; *Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's

> defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

Here, the court is compelled to conclude that defendant Moore has not demonstrated that he was prejudiced by his counsel's alleged errors. Moore asserts that his counsel's failure to investigate the laws concerning his indictment resulted in his counsel failing to

see flaws in the indictment which would have formed the basis for dismissal of the indictment. Defendant Moore asserts that the indictment was defective because the conspiracy count incorporates "the same penalties" as those found in the substantive counts. Thus, the gist of Moore's claim is that his sentence under Counts I and II of the indictment constitute double punishment prohibited by the Fifth Amendment's double jeopardy clause. Count I of the indictment charged Moore with conspiring to commit bank robbery, in violation of 18 U.S.C. § 371; Count II charged the substantive violation of 18 U.S.C. § 2113(a). It is axiomatic that the double jeopardy clause protects against multiple punishments for greater and lesser included offenses. *See United States v. Kirk*, 723 F.2d 1379, 1381 (8th Cir. 1983), *cert. denied*, 466 U.S. 930 (1984). It is equally well established that a defendant does not receive double punishment when he is convicted and sentenced for a substantive offense, and for conspiring to commit the offense. *See United States v. Felix*, 503 U.S. 378, 389 (1992); *United States v. Evans*, 272 F.3d 1069, 1088 (8th Cir.), *cert. denied*, 535 U.S. 1029 (2002); *United States v. Santana*, 150 F.3d 860, 864 (8th Cir. 1998); *United States v. Halls*, 40 F.3d 275, 277 (8th Cir. 1994), *cert. denied*, 514 U.S. 1076 (1995); *United States v. Miller*, 995 F.2d 865, 868 (8th Cir.1993); *United States v. Thomas*, 971 F.2d 147, 149 (8th Cir. 1992), *cert. denied*, 510 U.S. 839 (1993). Thus, Moore cannot establish that he was prejudiced by his attorney's failure to seek dismissal of the indictment. Therefore, this part of defendant Moore's motion is denied.

2. Burglary of a commercial building

Defendant Moore also contents that a prior conviction for burglary of a commercial building should not have qualified as a "crime of violence" under the Career Criminal Act because it did not qualify under section 4B1.1 of the United States Sentencing Guidelines. Defendant Moore, however, did not raise this issue on direct appeal and does not contend that the failure to raise this issue was due to ineffective assistance of counsel. As the court

noted above, issues that could have been, but were not, raised on direct appeal are waived and cannot be asserted for the first time in a collateral § 2255 action absent a showing of cause and actual prejudice, or a showing of actual innocence. *See United States v. Frady*, 456 U.S. 152, 167-68 (1982); *Swedzinski v. United States*, 160 F.3d 498, 500 (8th Cir. 1998). Thus, the court concludes that defendant Moore's claim that his prior conviction for burglary of a commercial building should not have qualified as a "crime of violence" under the Career Criminal Act has not been appropriately raised in this § 2255 motion because it could have been raised on direct appeal and was not. *See Frady*, 456 U.S. at 167-68. Therefore, this part of defendant Moore's motion is also denied.

3. Applicability of the Apprendi decision

Defendant Moore also raises three claims that his sentence was incorrect because of the operation of the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Moore asserts that his sentence under the Career Criminal Act is unconstitutional in light of *Apprendi*, that his sentence enhancement for valuation was unconstitutional under *Apprendi*, and that his sentencing enhancement under U.S.S.G. § 2B3.1(2)(E) was unconstitutional under *Apprendi*. Review of these issues is precluded by the Eighth Circuit Court of Appeals's conclusion that the *Apprendi* decision presents a new rule of constitutional law that is not of "watershed" magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review. *Hines v. United States*, 282 F.3d 1002, 1004 (8th Cir.), *cert. denied*, 537 U.S. 900 (2002); *Sexton v. Kemna*, 278 F.3d 808, 814 n.5 (8th Cir. 2002), *cert. denied*, 537 U.S. 1150 (2003); *Murphy v. United States*, 268 F.3d 599, 600 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002); *Jarrett v. United States*, 266 F.3d 789, 791 (8th Cir. 2001), *cert. denied*, 535 U.S. 1007 (2002); *United States v. Dukes*, 255 F.3d 912. 913 (8th Cir. 8th Cir. 2001), *cert, denied*, 534 U.S. 1150 (2002); *United States v. Moss*, 252 F.3d 993, 995 (8th Cir. 2001), *cert. denied*, 534 U.S.

1097 (2002). This view of the *Apprendi* decision has also been adopted by a clear majority of the other federal courts of appeals. *See, e.g., Sepulveda v. United States*, 330 F.3d 55 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003); *United States v. Brown*, 305 F.3d 304 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378 (6th Cir.), *cert. denied*, 537 U.S. 1096 (2002); *Dellinger v. Bowen*, 301 F.3d 758 (7th Cir. 2002), *cert. denied*, 537 U.S. 1214 (2003); *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir.), *cert. denied*, 537 U.S. 939 (2002); *United States v. Sanders*, 247 F.3d 139 (4th Cir.), *cert. denied*, 534 U.S. 1032 (2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 536 U.S. 906 (2002). Therefore, the court is unable to reach the merits of Moore's claims.

C. Certificate Of Appealability

Defendant Moore must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S.

473, 484 (2000)). The court determines that Moore has failed to make a substantial showing of the denial of a constitutional right, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Moore's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Moore's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that Moore has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 28th day of September, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA